could not exist in any state unless the constitution thereof by implication at least permitted the executive or legislative department to declare it.[14] In the constitutions of several states the bill of rights is expressly declared to have the same force in time of war as in time of peace. During the recent strikes in West Virginia, whose bill of rights contains this clause, the governor with the authority of the legislature declared martial law to exist, and caused rioters to be arrested and imprisoned by a military commission. It was held that necessity justified this action, and the writ of *habeas corpus* was refused though the constitution expressly declared that the writ should never be suspended. *State ex rel. Mays* v. *Brown*, 77 S. E. 243 (W. Va.). It is submitted that this result is sound. As necessity may justify an order to fire upon a mob, so it may justify imprisoning a rioter if the civil authorities are still incompetent to deal with his case. But for the reasons mentioned above the court seems utterly inconsistent in concluding that the governor's action was not reviewable.[15] The result of this view is to make the governor judge of the necessity of his own acts, thus nullifying all constitutional safeguards, and leaving the liberty of citizens subject to the caprice of a military despot.

THE LEGAL STATUS OF UNBORN CHILDREN. — The New York Appellate Division has recently laid down *obiter* the doctrine that a child may recover for prenatal injuries. *Nugent* v. *Brooklyn Heights R. Co.*, 139 N. Y. Supp. 367 (Sup. Ct., App. Div.).[1] In determining whether a child *en ventre sa mère* is a legal person with capacity for rights, it is helpful to examine the treatment accorded him in other departments of the law. He takes under a devise to children "living" [2] or "born" [3] at a given time. This does not, however, involve the recognition of a child *en ventre sa mère* as a separate existent entity, but is purely a rule of construction based on the ground that "such children come within the motive and

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[14] See *Ex parte* Milligan, 4 Wall. (U. S.) 2, 137, 141.

[15] Various executive civil officers are often given power to call out the troops to assist the police in keeping order and enforcing the civil law. The discretion of the officer in whom this power is vested is in such a case conclusive as to whether or not military assistance is necessary. Ela *v.* Smith, 5 Gray (Mass.) 121; Franks *v.* Smith, 142 Ky. 232, 134 S. W. 484. For this is a power vested in a coördinate branch of the government by the Constitution and laws of the United States or of the state, as the case may be, and the court has no right to substitute its judgment for that of the official to whom discretion is given. But this is a very different situation from that in the principal case, where the governor, acting in excess of his express powers, has arrested a citizen in disregard of civil law, and caused him to be tried by a military commission.

[1] In the particular case the injuries were inflicted by a carrier who was ignorant of the mother's pregnancy. The court denied recovery on the ground that the plaintiff was not a passenger. See Walker *v.* Great Northern Ry. Co. of Ireland, L. R. 28 Ir. 69. If the difficulties as to regarding the unborn child as a person could be overcome, it might well be argued that the known fact that a considerable portion of the female traveling public may be pregnant should justify the imposition on the carrier of a duty of care towards the infant.

[2] Doe d. Clarke *v.* Clarke, 2 H. Bl. 399.

[3] *In re* Salaman, [1908] 1 Ch. 4. *Enfants en ventres ses mères* do not, however, come within the description "children born" unless it is for their benefit. Villar *v.* Gilbey, [1907] A. C. 139.

reason of the gift." [4] Similarly he comes within the Statute of Distributions,[5] and is included in the terms of Lord Campbell's Act allowing suit by children for the death of their father.[6] In a sense it may be said that an unborn child is treated as living for the purpose of the Rule against Perpetuities [7] and the revocation of wills.[8] A more accurate statement of the result of the cases is that the limitation imposed by the Rule against Perpetuities is twenty-one years and the lives of persons conceived at the time of the gift plus the period of gestation of the donee; [9] and that a will is revoked by the subsequent marriage of the testator and the conception of a child afterwards born alive. In like manner it is more nearly correct to say that in the case of children *en ventres ses mères* an exception is made to the rule that contingent remainders must vest before the termination of the preceding estate,[10] than that the law of real property here recognizes the unborn child as an existent person.[11] Indeed, quite the contrary is shown by the well-settled rule that in the interim between the death of a testator devising land to a child *en ventre sa mère* and the birth of the child, the heir-at-law is entitled to the rents and profits.[12] There is mention in the books of one Lutterel's

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[4] See Villar *v.* Gilbey, [1907] A. C. 139, 144, 145.

[5] Wallis *v.* Hodson, 2 Atk. 114. This case like many in this connection relies on the maxim of the civil law, *nasciturus pro nato habetur*. This has also been urged to support the recovery by a child for prenatal injuries. See 1 BEVEN, NEGLIGENCE, 3 ed., 75. The civil law-writers lay down as a general proposition that an *enfant en ventre sa mère* is to be considered as born when for his benefit. The instances given, however, are always concerning the devolution of property, the civil status of the child when born and the like. The civil lawyers do not seem to have adverted to this precise situation. There is no reason to suppose that a recovery would be allowed. See 2 SAVIGNY, SYSTEM DES RÖMISCHEN RECHTS, § 62; 1 AUBREY ET RAU, DROIT CIVIL FRANÇAIS, § 53; 8 LAURENT, DROIT CIVIL FRANÇAIS, §§ 535, 536. The German Civil Code expressly provides that a person's capacity for rights shall date from complete birth. Certain specific instances are marked out in which the rights of the child after birth are to be determined as though he had been born when conecived; none, however, covers the case of prenatal injuries to the *foetus*. 1 PLANCK, BÜRGERLISCHES GESETZBUCH, § 1; 1 DERNBURG, BÜRGERLISCHES RECHT DES DEUTSCHEN REICHS UND PREUSSENS, § 49.

[6] The George and Richard, L. R. 3 A. & E. 466; State *ex rel.* Niece *v.* Soale, 36 Ind. App. 73, 74 N. E. 1111; Nelson *v.* Galveston, H. & S. A. Ry. Co., 78 Tex. 621, 14 S. W. 1021. It is significant that in The George and Richard, *supra*, the decree awarding damages was made conditional upon the child's birth. If the child were really a person there seems no reason why the decree should not have been absolute, the damages to go to the child's administrator in case he should not be born alive.

[7] Long *v.* Blackall, 7 T. R. 100; *In re* Wilmer's Trusts, [1903] 1 Ch. 874, [1903] 2 Ch. 411.

[8] Doe d. Lancashire *v.* Lancashire, 5 T. R. 49.

[9] And possibly the person, if there be such, whose minority constitutes the period of twenty-one years. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 222.

[10] See LEAKE, PROPERTY IN LAND, 2 ed., 238.

[11] In Reeve *v.* Long, 3 Lev. 408, the House of Lords decided, contrary to the opinion of all the judges, that a contingent remainderman under a will who was *en ventre sa mère* at the termination of the preceding estate was on birth entitled to the land. The same rule was laid down by an act of Parliament as to grants *inter vivos*. 10 & 11 WM. III, c. 16.

[12] *In re* Mowlem, L. R. 18 Eq. 9. And so the rents in the interval between the death of the ancestor and the birth of his posthumous son go to the presumptive heir. Basset *v.* Basset, 3 Atk. 202; Richards *v.* Richards, Johns. 754. In Basset *v.* Basset, *supra*, the contingent remainderman under a deed who was *en ventre sa mère* at the termination of the preceding estate was held entitled to the rents from that period,

Case,[13] in which an injunction to stay waste was granted on behalf of a child *en ventre sa mère*. In the desire of a court of equity, however, to restrain the unconscionable use of a legal power,[14] the consideration of whether anyone existed in whose favor the right might be exercised may well have been disregarded. The analogies of the criminal law have been urged in support of the infant's claim for damages. Injuries to a child while in the womb of its mother which result in its death after having been born alive may support an indictment for manslaughter or murder.[15] This is correct on any theory. The defendant's act has caused the death of a human being; it is then homicide, regardless of whether or not the victim was in being at the time the act was done. On the other hand the holdings that no injuries to a child *en ventre sa mère* can be homicide unless the child is born alive [16] are conclusive against the contention that the criminal law recognizes the unborn child as a person.

Judicial decision has thus consistently adopted the ordinary conception that a person's existence dates from his birth. It follows that he cannot recover for prenatal injuries although they caused his birth in a deformed condition. For there has been no injury to him as an independent entity, since his condition as a result of the defendant's act is at no time worse than at any previous point in his existence.[17] Such has been the result reached by all the decided cases.[18]

PRICE RESTRICTION ON THE RE-SALE OF CHATTELS. — Contracts enabling a patentee to control the price in re-sales of articles manufactured under his patent violate neither the common-law prohibition

since the Act of 10 & 11 WM. III, *supra*, expressly provided that in such a case the child should be treated as born.

[13] Cited in Hale *v.* Hale, Finch's Precedents in Chancery 50. See also Robinson *v.* Litton, 3 Atk. 209, 211.

[14] As, for example, the restraining of a tenant without impeachment of waste from making an unreasonable use of the property. The cases are collected in 1 AMES, CASES ON EQUITY, 469.

[15] 3 INST. 50; Rex *v.* Senior, 1 Moody C. C. 346; Queen *v.* West, 2 C. & K. 784, 44 Sol. J. 52.

[16] Rex *v.* Poulton, 5 C. & P. 329; Rex *v.* Enoch, 5 C. & P. 539. See 1 RUSSELL, CRIMES, 7 ed., 663.

[17] It might be urged that in estimating ordinary damages the plaintiff's present condition is compared not exclusively with his prior condition, but with that in which he would now be except for the defendant's act. But this is merely a convenient way of comparing his prior condition and its possibilities of improvement with his present condition. Nor has any such principle ever been the basis of a substantive cause of action.

[18] Walker *v.* Great Northern Ry. Co. of Ireland, L. R. 28 Ir. 69; Dietrich *v.* Inhabitants of Northampton, 138 Mass. 14; Allaire *v.* St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638; Gorman *v.* Budlong, 23 R. I. 169, 49 Atl. 704. But see Villar *v.* Gilbey, [1907] A. C. 139, 144. The text-writers are *contra*. See 1 BEVEN, NEGLIGENCE, 3 ed., 73–76; SALMOND, TORTS, 2 ed., 349, 350. Very likely the courts have been influenced by a fear of trumped-up damage suits. Walker *v.* Great Northern Ry. Co. of Ireland, L. R. 28 Ir. 69, 81, 82. The considerations which have led to a denial of recovery in many jurisdictions for injuries negligently inflicted without physical contact are multiplied in this case. Spade *v.* Lynn & Boston R. Co., 168 Mass. 285, 47 N. E. 88. *Contra*, Dulieu *v.* White, [1901] 2 K. B. 669.